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October 31, 2003

Via E-mail - adoptionregs@state.gov
and First Class Mail

U.S. Department of State
CA/OCS/PRI
Adoption Regulations Docket Room
SA-29
2201 C Street, NW
Washington, DC 20520

RE: **Docket Number State/AR-01/96**
Proposed Amendments to the Hague Convention:
Subpart F, page 54100, 96.33(h) – Financial and Risk Management
Subpart F, page 54102, 96.39(d) – Blanket Waivers of Liability
Subpart F, pages 54105 and 54106 – Using Supervised Providers in the United States and in other Convention Countries

Dear Sir/Madam:

I write respectfully in vigorous opposition to the above proposed amendments to the Hague Convention. As discussed below, both separately and in combination, it is difficult to conceive of a set of proposed regulations which would more undermine the well-established goals of international adoption (i.e., uniting children born in foreign countries into difficult and often dangerous circumstances with adults living in other countries who desire and are prepared to parent them).

By way of background, I am the father of a 20 month old little girl adopted from Colombia. My family has been through the international adoption process. I spent nearly 5 weeks last year in Bogotá, Colombia navigating, with the assistance of an international adoption agency, a difficult foreign bureaucracy in order to bring my daughter home. I am also a trial lawyer who has represented international adoption agencies in "wrongful adoption" cases. I am the author of an article which appeared in the Boston Bar Journal (May/June 2000 edition) entitled "Enforcement of Contractual Release and Hold Harmless Language in 'Wrongful Adoption' Cases." (I enclose a copy of the article). I am also Chairman of the Board of the Alliance for Children Foundation, Inc., a Wellesley, Massachusetts based non-profit Foundation which raises money to support children living in orphanages in foreign countries and.

importantly, the many children who are left behind because there are no prospective adoptive parents interested in adopting them.

Let me address the above proposed amendments in order.

The proposal to require adoption agencies to maintain a minimum of $1 million in liability insurance is unrealistic and misdirected. It is already extremely difficult for agencies even to get insurance. I am aware of only two insurers who are willing to write this risk. Once an agency has received a claim, they typically are cancelled for the following year. Even when insurance can be obtained, the cost is exorbitant. I am aware of an agency which pays over $65,000 per year for $1 million worth of coverage. To the extent this cost can be passed on to prospective adoptive parents in an agency doing, for example, 200 adoptions a year, this adds an average additional cost to an adoption of $325. This is a substantial increase in fees which negatively impacts upon the number of people able to adopt and, in turn, the number of children who will be adopted.

Most agencies are non-profit entities. Accordingly, the requirement that they absorb the cost of mandated insurance impacts their ability to perform their charitable purpose, not their profits. Indeed, to encourage adoptions many agencies already utilize a sliding scale of fees pursuant to which lower income couples can pay less for an adoption. The agencies ability to do this *will* be directly impacted by the requirement of maintaining $1 million in insurance coverage. It is difficult to conceive why the State Department would be in favor of imposing such a prohibitive administrative cost on a non-profit entity engaged in a charitable undertaking.

The proposal to prohibit contractual assignment of risk agreements too is misplaced and, frankly, ill conceived from a public policy perspective. As a threshold matter, courts considering such agreements have explicitly upheld the public policy of allowing agencies engaged in the difficult work of international adoption to educate their clients to the well-established risks and asking them to acknowledge and accept that risk. In Forbes v. Alliance for Children, *a Massachusetts Superior Court decision upholding a risk acknowledgment and waiver agreement*, the Court explicitly recognized that there are risks inherent in adopting a child from another country, especially the unknown and unknowable medical risks at issue in that case, and that without such agreements the important work of international adoption agencies could not go forward. I enclose a copy of the decision.

As the parent of both an adopted child and a biological child it is difficult to understand why someone who wants to adopt a child from another country is entitled to a de facto guarantee that the child will be physically and emotionally healthy where no such guarantee exists with regard to biological children. This would be the net effect of barring assignment of risk agreements.

Keep in mind that no contractual waiver agreement is ever enforceable in instances of fraud or bad faith. As a result, the amendment can only be viewed as being directed at barring an agency from protecting itself against unintentional mistakes regarding issues which might very

well be inherently unknowable. For example, agencies typically advise prospective adoptive parents that children living in orphanages may be delayed developmentally due to a lack of stimulation. Such delays can mask a variety of conditions. Children available for adoption literally may have been left at an orphanage with no medical information about them or their biological parents. There may be no ability to evaluate a child in an orphanage before an adoption given the lack of a modern medical system in the host country or local bureaucracy. These are just examples. The point is that prospective adoptive parents can be (and typically are) educated to these risks and go forward knowing and accepting them, just like parents who decide to go forward with a high risk birth are made aware of the inherent risks and potential consequences in doing so. Indeed, by analogy, the proposed amendment is the equivalent of barring a physician who is asked to deliver a baby in a high risk delivery where both mother and baby could die, from asking the parents to sign an informed consent form. I am aware of no legal precedent for such a prohibition and I suspect that such a bar would not survive legal challenge.

Finally, the proposal to make domestic agencies liable, apparently strictly and vicariously, for the acts of those individuals helping them overseas is also unrealistic and of doubtful legal enforceability. Traditional and accepted notions of vicarious tort liability in this country are predicated upon fault and the control or right to control the actions of another. Thus, an employer in many circumstances can be held liable for the acts or omissions of an employee under the employer's control. Here, however, the proposed amendment would hold domestic international adoption agencies responsible for the acts of persons overseas that they often have no control over at all, who act independently, and who are subject to different oversight, rules and regulations in the host country.

Keeping in mind that existing concepts of liability already subject domestic agencies to liability for the malfeasance of those overseas individuals who they do in fact control or have the right to control, the proposed amendment would render the agency liable for any negligent act done by anyone under any circumstances involved in a particular adoption so long as the agency was working with them in some capacity. So, for example, an error made by a pediatrician who regularly attends to orphanage children by mandate of some rule or regulation in the host country, and who the agency did not choose but must deal with, becomes, potentially, the liability of the domestic United States agency. This is true despite the fact that the alleged act or omission occurred in a foreign country and the agency had no control over the quality of the care given or an ability to insist upon a different pediatrician. Putting aside the jurisdictional unfairness inherent in such a situation, and putting aside the likely unwillingness of an insurer even to insure against acts or omissions of a non-employee, the imposition of this type of liability is unheard of in our system to my knowledge.

In combination, the above proposals, I am confident, will simply put most agencies out of business. Agencies subject to strict, vicarious liability for the actions of persons they cannot control, unable to insure against the risks, and unable to ask prospective adoptive parents to accept the risk, will not continue to operate. As agencies close down, children will be left abandoned in orphanages.

I do not think there is any way to overstate the dramatic and negative impact the proposed amendments will have on children living in orphanages. When I think about my own experience as an adoptive father, I am deeply saddened to think regulations which are no doubt well intentioned, will actually destroy the very system they are hoping to protect.

Thank you for your consideration.

Very truly yours,

Howard M. Cooper

HMC:cas

Enforcement of Contractual Release and Hold Harmless Language in "Wrongful Adoption" Cases

by Howard M. Cooper

There has been a relative explosion of litigation nationally in which plaintiff/parents are pursuing claims against adoption agencies and their staffs for "wrongful adoption." A recent article in the Wall Street Journal reported that "In a growing number of lawsuits, parents are claiming that adoption agencies intentionally misrepresented their children's medical histories or negligently failed to disclose important information."[1] The article pointed out that "Passions run high in these cases. Often, they ... involve parents whose emotions were already rubbed raw by not being able to have their own children. Many then faced a legal obstacle course to adopt. Gradually realizing that their long awaited child has physical or mental problems can be the last straw, emotionally. What's more, to prove their claim, parents must often argue that they would not have adopted the children if they had known the truth."[2]

Central to these cases is the emerging issue of whether parents can be held to agreements made in advance of an adoption in which they acknowledge the risks of adoption, agree to accept those risks, and hold the agency through which they are adopting and its staff harmless against any negligence claims. At stake from the agency's perspective, is whether the agency can protect itself and its workers, who must carry out their work in a litigious society, against *widely recognized risks so that it can fulfill its charitable,* profit mission of uniting children living in sometimes rific conditions with parents who want them. One recent Massachusetts decision, *Forbes v. The Alliance for Children, Inc., et al,* Suffolk County, Civil Action No. 97-04860-B, held that such agreements are enforceable and do not violate public policy.

Consider the hypothetical case of John and Mary Doe. The Does spent several years going through fertility treatments that included invasive medical procedures, frequent and painful injections, and repeated and profound disappointment and loss at not being able to produce a biological child. After counseling, the Does decide to adopt. Because of their concerns about privacy, their fear of a biological parent appearing unannounced in their lives at a future date, and their desire to adopt a baby quickly, the Does decide to adopt internationally from a former Eastern bloc country.

Excited about the prospect of finally being parents, the Does apply to an agency specializing in international adoptions from orphanages in Eastern European countries. After a few months, which include a home study and the furnishing of extensive information about themselves and their suitability as parents, the Does receive a photograph of their assigned child. They immediately fall in love with the child in the picture, their prayers finally answered. The Does are also given a two page medical history of the child, translated into English by the agency. This is the only medical information authorized by the country from which they are adopting. The medical information is sparse, but appears to indicate a healthy baby. The Does furnish a room in their house for their new baby and pack their bags for a trip overseas.

For its part, the adoption agency through which the Does are adopting is a not for-profit corporation founded and staffed by dedicated personnel. The agency's stated, charitable purpose is to unite children living in terrible conditions in foreign orphanages with parents who want them. Agency employees have visited the orphanages and are aware of their difficult conditions, the typical problems of developmental delay exhibited by practically all orphanage children, the political sensitivities of foreign governments who have large orphanage populations and, most importantly, the limited and often incomplete family and medical information available about orphanage children (some of whom literally are abandoned at the orphanage door).

The agency also knows that sometimes things can go wrong. A child thought to be available, at the last minute is unavailable. A child thought to be healthy, later turns out to have a previously undetected or undiagnosed medical condition. Despite repeated attempts to obtain additional information and to open up the foreign process, agency workers and representatives are thwarted in their efforts by foreign governments which strictly regulate the agency's access to the orphanage, and to information about the children available for adoption. Yet, the needs of the children are the agency's driving motivation; the agency is dedicated to finding them homes no matter how difficult the process.

Accordingly, the agency asks each parent who adopts through it to acknowledge and accept up front the risks inherent in the process. In particular, the agency asks each prospective adoptive parent to sign a Medical Release Form. In that form, each parent accepts in writing the risk of any "unknown or undetected condition." Each parent also releases and agrees to hold the agency harmless for any future medical problem with the adopted child. Finally, the agency counsels the family that if they encounter any problem with the child while overseas, they are not obligated to accept the placement.

The Does arrive in the foreign country. Eager to meet their child, they quickly travel from a capital city to an outlying village where the orphanage is located. There, they are introduced by non English speaking orphanage personnel to their baby. For a few moments their dream is realized. They are parents. They and their child are a family.

Within days, however, the Does find their child is not

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"normal." Something seems wrong beyond the typical problems of orphanage children they have been told to expect. However, they do not, and emotionally cannot, even consider going home without their baby. They come back to the United States. They begin to make the rounds of physician visits. Ultimately, they are informed that their child has a severe and permanent medical problem. The Does feel lied to and victimized. Their dream becomes a nightmare of doctor visits and financial drain. Despite their signatures on legal documents explicitly accepting precisely the risk of a child with an undiagnosed or undetected medical problem, they feel strongly that this is not what they bargained for and that the agency somehow should have done more to protect them. Exhausted, the Does consult with legal counsel and file a lawsuit. The agency counters by pointing to the Medical Release Form and other documents which the parents signed in advance of the adoption. The agency moves to dismiss the complaint.

According to at least one Justice of the Massachusetts Superior Court, the release and hold harmless language of the Medical Release Form signed by the parents in advance of adopting bars their claims against the agency for negligence, and such contractual arrangements do not violate public policy.

In analyzing facts before her very similar to the above hypothetical, Judge Margaret R. Hinkle addressed this precise issue of first impression in Massachusetts in *Forbes v. Alliance for Children, Inc. et al.*, Suffolk Superior Court, Civil Action No. 97-04860-B (Dec. 16, 1998). In her opinion, Judge Hinkle recognized first that it is settled law in Massachusetts, "that traditional tort principals apply to the relationship between adoption agencies and potential parents during the adoption process" citing *Mohr v. Commonwealth*, 421 Mass. 147, 163 (1993). In *Mohr*, adoptive parents brought suit against the Commonwealth of Massachusetts and its social workers, alleging that the defendants negligently failed to provide accurate and complete information about their daughter's background, "particularly her medical and family history, as well as her probable needs for future treatment and care ..."[1] The parents alleged that the defendants failed to disclose to them available records indicating that their daughter's birth mother had been diagnosed with chronic schizophrenia, requiring a commitment to a state hospital, that their daughter's early infant development had been "stunted," and that she had been diagnosed with "cerebral atrophy."[2] A jury returned a verdict in the plaintiffs' favor in the amount of $200,000. The Commonwealth appealed.[3]

On appeal, the Supreme Judicial Court in *Mohr* considered whether Massachusetts should recognize a cause of action in tort which would allow adoptive parents the right to compensatory damages against an adoption agency for the agency's negligent misrepresentation of facts prior to the adoption concerning the adopted child's history.[4] The SJC surveyed case law from other jurisdictions and noted that many courts already recognized a cause of action for "wrongful adoption" based upon an agency's intentional misrepresentations to parents prior to adoption.[5] Accordingly, the SJC held that "We agree that the straightforward application of well-established common law principles support recognition of a cause of action in tort for an adoption agency's material misrepresentations of fact to adoptive parents about a child's history prior to adoption."[6] The SJC went further, however, holding that the tort of "wrongful adoption" encompassed *both* intentional *and* negligent misrepresentation claims.[7] The SJC noted that pursuant to 100 Code Mass. Regs. Sec. 7.213(3) (1984) an adoption agency has "an affirmative duty to disclose to adoptive parents information about a child that will enable them to make a knowledgeable decision about whether to accept the child for adoption."[8] As a result, an agency's negligent failure to disclose available information could render it liable in tort to the adoptive parents.

In light of *Mohr*'s clear holding that Massachusetts law allows plaintiff/adoptive parents to hold an adoption agency liable in tort for its negligent misrepresentations about a child's medical status, Judge Hinkle then confronted the issues of whether a plaintiff's negligence claims could be barred by contractual release documents signed in advance of the adoption and whether the enforcement of such release and hold harmless language would run afoul of public policy.[9] Judge Hinkle first set forth the relevant release language at issue contained in three (3) separate documents signed by the plaintiffs:

> In consideration of [Agency] undertaking to assist us in seeking to adopt a child from another country, we agree to indemnify and hold harmless [Agency], its Directors, Officers, representatives, and employees, from any problems or liability. We understand that [Agency] nor any of its representatives can guarantee the future medical condition of this child. Therefore, the Adoptive Parents agree not to hold [Agency] or any of its representatives responsible for any medical condition which might develop or be discovered in the future.
>
> We have read and understood the risks, nevertheless, it is our desire to go forward with the adoption process.
>
> . . .
>
> We do hereby release, indemnify and hold harmless [Agency], its directors, officers, representatives, and employees should a child be diagnosed as being HIV, having or suffered from AIDS or AIDS related complex, from Hepatitis B, or any presently undiagnosed and untested medical condition or illness regardless of its severity.
>
> We agree to hold [Agency] harmless for any illness the child may have or acquire and the consequences of such illness or for the child's death resulting from such illness. Furthermore, we understand that neither [Agency] nor any representative can guarantee the future medical condition of this child. Therefore, we agree not to hold [Agency] or any of its representatives responsible for any medical conditions presently undiagnosed or untested which might develop or be discovered in the future.
>
> . . .
>
> Upon completion of the above obligations [Agency], we agree to indemnify and hold harmless [Agency] and release its directors, officers, representatives and employees from all liability and damages arising out of, or associated

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(b) Alimony. The issue is whether a claim for alimony, preserved under Section 522(c), is enforceable by forced sale of homestead property in contravention of a state law prohibiting this remedy. In the Fifth Circuit Court of Appeals case of *Davis v. Davis*, the debtor filed for bankruptcy, whereupon his ex-wife pursued and obtained a judgment from the Bankruptcy Court that her claim for alimony, child support and maintenance was nondischargeable under Section 523(a)(5). The ex-wife then sought to enforce her judgment by foreclosing on the debtor's homestead, and the debtor protested on the grounds that the Texas homestead law provided an exemption of property from seizure and sale to satisfy the debtor's alimony and child support debts. The Court held that the ex-wife was entitled, under Section 522(c)(1), to enforce her nondischargeable judgment, but that the remedies available to her were governed by Texas collection laws because "Sec. 522(c) is not an execution statute and does not preempt relevant Texas law." The Court noted that the U.S. Congress could alter this situation by enacting a federal execution statute, but that until that time Texas's enforcement mechanisms controlled. The *Davis* ruling is consistent with the First Circuit's decision in *Weinstein*, and there is no reason to believe that a Massachusetts Court would rule differently given the same circumstances.

IV. Conclusion. Because some provisions of the Act are ambiguous, while others conflict, the Act is, in some respects, unknowable. The irony of this confusion is that the purpose of the Act is simple - protect the family home from creditors. First enacted in 1851, the Act was amended 11 times before being rewritten in 1977, and has been amended 17 times since then. These are not the vital statistics of a healthy statute. Many of these amendments failed to solve existing problems or created new problems. At the dawn of the 21st century, we are left with a 19th century statute, with a few 20th century bells and whistles. It's ugly, clumsy, even embarrassing - and it just doesn't work. The baby is long gone; let's throw out the bathwater. This proposal is necessary because, in a very real sense, there currently is no Massachusetts homestead law: the Act is unintelligible or silent on many issues and the vast majority of the cases are coming out of the Bankruptcy Court, not state courts.

The Act should be replaced and the new statute should:

1. make homestead protection automatic, without any filing requirement or, barring this, make filing relate back to the date of purchase;
2. expressly provide for joint filing;
3. provide that a creditor may force the sale of the property in order to liquidate the equity in excess of the exemption;
4. shield sale proceeds of homestead property for a limited time so that the owner may reinvest the proceeds into a new homestead;
5. provide that a replacement homestead or change of election for an existing homestead (assuming the three types of homestead are retained) relates back to the time of the original homestead;
6. make homestead protections under the Act cumulative;
7. provide that a surviving spouse may terminate the homestead interest of minor children without having to have a guardian appointed.

With these suggested changes incorporated into the Act, it would be, on or about the sesquicentennial of its enactment, better than new.

ENDNOTES

1 Mass. Gen. L. ch.188
2 21 Massachusetts Practice (Probate Law and Practice) §7.6 at p.99 (1997)
3 5 Massachusetts Practice (Methods of Practice) §294 at p.234 (1986)
4 Land Court Guidelines to Registry Districts
5 14B Massachusetts Practice (Summary of Basic Law) §17.89 at p.672 (1996)
6 Mass. Lawyers Weekly, March 31, 1996, p.27
7 Thompson on Real Property §21.03(a) at p.157 (D.A. Thomas, ed., 1994)
8 1 American Law of Property §5.75 at p.810 (A. J. Casner, ed., 1952)
9 Act of Jan. 26, 1839, [1838-1840] Laws of the Republic of Texas, p. 113
10 St. 1651, c.340 §§1, 4
11 Harold Lavien and Judy K. Mencher, *The Eclipse of Massachusetts Tenancy by the Entirety and a Reappraisal of Homestead as They Relate to Bankruptcy*, Mass. L. Rev., Winter 1982, pp.176-177
12 28 Massachusetts Practice (Real Estate Law) §6.9 at p.155 (note 1) (1995)
13 40 Am Jur 2d, Homestead §4 at p.254 (1999)
14 George L. Haskins, *Homestead Exemptions*, 63 Harvard Law Review 1289-90 (1950); also 40 Am Jur 2d, Homestead §4 at pp.253-254 (1999)
15 *Supra* note 12
16 Mass. Gen. L. ch.188 §2
17 *Supra* note 8, §5.84 at pp.832-833
18 Haskins, *supra* note 14, at p.1301
19 *Supra* note 12
20 Mass. Gen. L. ch.188 §1
21 Mass. Gen. L. ch.188 §1
22 *See Dwyer v. Compellin*, 424 Mass. 26, 673 N.E.2d 863 (1996)
23 *In re Cespedes*, 175 B.R. 1 (Bkrtcy. D. Mass. 1994)
24 Jordan B. Cherick, *The Homestead Act: An Important Law to Protect the Family But a Law in Need of Reform*, Mass. L. Rev., July/October 1980, p.178
25 Mass. Gen. L. ch.188 §7
26 5 ALR 4th, Contract to Convey Homestead - Signature) §2 at p.1312 (1981)
27 Mass. Gen. L. ch.188 §7
28 Mass. Gen. L. ch.188 §8
29 *Atlantic Savings Bank v. Metropolitan Bank & Trust Co.*, 9 Mass. App. Ct. 266 (1980)
30 *See In re Guarazzo*, 128 B.R. 321 (Bkrtcy. D. Mass. 1990)
31 Mass. Gen. L. ch.188 §2
32 23 M.L.W. 663 (January 25, 1995)
33 5 Massachusetts Practice (Methods of Practice) §294 at p.235 (1986)
34 Haskins, *supra* note 14, at p.1314
35 Mass. Gen. L. ch.209 §1A
36 Lawyers Weekly No. 14-035-99
37 Massachusetts Collection Law, at §9.52 (Jordan L. Shapiro, Marc G. Perlin and John M. Connors (1992))
38 164 F.3d 677 (1st Cir. 1999)
39 170 F.3d 475 (5th Cir. 1999)
40 233 B.R. 11 (Bankr. D. Mass. 1999)

"Wrongful Adoption" Cases

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> with the placement of the child in the home of the Adoptive Parents. Furthermore, we understand that neither [Agency] nor any of its representatives can guarantee the present or future medical condition of the child. Therefore, we agree not to hold [Agency] or any of its representatives responsible for any medical conditions which might develop, or be discovered in the future.[17]

After reviewing this language, Judge Hinkle determined that "early in the adoption process, plaintiffs agreed that they read, understood and acknowledged the risks of international adoption and agreed to indemnify and hold

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"Wrongful Adoption" Cases

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[the Agency] harmless[.]"[73] The Court noted that the ... and hold harmless language was neither in small ... or concealed within a lengthy form, and that the language was "comprehensive in scope, covering present and future conditions and known and undiscovered conditions."[74]

The Court then turned to the plaintiffs' contention that enforcing the contract language would violate public policy. The Court first reviewed regulations promulgated by the Office for Children, 102 C.M.R. §5.00 *et seq.*, prohibiting a licensed agency from knowingly and willfully *making false statements to prospective adoptive* parents (§5.04(8)), and requiring disclosure of certain information to prospective adoptive parents, (§5.10(9)).[75] The Court concluded that the plaintiffs had offered no evidence of any willful breach of the regulations, which by their terms are directed at intentional misconduct.[76] The Court then concluded "These regulations fail to directly support plaintiff's conclusion that public policy precludes allocation of risk by agreement between an adoption agency and prospective adoptive parents in the international adoption context."[77] Instead, the Court adopted the view that "public policy is well-served by allowing ... plaintiffs and [agencies] to allocate the inherent risks of international adoption in order to facilitate such adoption."[78] The Court also noted that two other jurisdictions have upheld exculpatory contract provisions in the context of wrongful adoption suits resulting from international adoptions.[79]

Accordingly, under the reasoning of *Forbes*, a Massachusetts agency can protect itself against lawsuits by entering ... contracts with prospective adoptive parents, clearly and ... ing, stating that the prospective parents have been ... ed about the inherent risks of international adoption and providing that the parents have nevertheless agreed to go forward while holding the agency and its workers harmless.

The *Forbes* decision appears to have generated *controversy in the adoption field. Advocates for adoptive* parents and many attorneys who regularly practice in the area maintain that it is inherently unfair and legally incorrect to treat the adoptive parent/agency relationship as a commercial transaction. They point to the unique nature and subject matter of the relationship between prospective adoptive parents and an adoption agency. They also point to the obvious vulnerability of prospective adoptive parents who often are emotionally desperate to adopt and presumably less prepared to be critical of information received from agencies. In so doing, these advocates suggest that any person undertaking the emotional process of adopting should be afforded extra protection from abuse and misinformation, and should not be subject to ordinary principles of contractual risk allocation.

No doubt the considerations and arguments raised by parent advocates are real and legitimate. However, they represent only part of the overall picture relative to international adoption. United States-based adoption agencies engaged in facilitating international adoptions do not have meaningful control over the foreign adoption process, the orphanage systems of foreign countries, or the medical care of the children available for adoption. In ... foreign countries where children are available for ... on, health care systems and training, would keeping ... *go surrender procedures, to name just a few items,* do not even remotely approach or resemble Western standards.

It is also widely recognized that infants and young children living for any length of time in an orphanage almost uniformly suffer from some degree of developmental delay resulting from a lack of one-on-one stimulation. As a result, orphanage children are already expected to exhibit some degree of problems, and the ability to differentiate between typical and expected developmental delays, and more severe and permanent medical problems is often difficult, if not impossible.

So too politics plays a role. After the fall of the communist dictatorship in Romania, for example, western media swarmed into ill-equipped and backwards Romanian orphanages in order to broadcast back to western countries horrible *images of rows of cribs containing infants infected with HIV.* This caused an embarrassed Romanian government to make it unofficial "policy" for years not to allow agencies even to bring video cameras into orphanages in order to take videos of infants and toddlers available for adoption.

In countries with emerging economies, cash payments and "gifts" at various stages of the adoption process are often an ordinary part of doing business. To a foreigner, however, such payments may appear to be the hallmark of a corrupt process which is difficult to understand and even harder to penetrate when attempting to get more information.

As a result of all these factors, the ability of an adoption agency to obtain and furnish available records and medical information in connection with an international adoption is not comparable to what is possible in the context of a domestic adoption. These real world differences must be recognized. In a litigious society such as ours, the ability of an agency to educate prospective parents about the risks of international adoption and then ask them to accept those risks is indispensable to an agency's ability to carry out its charitable purpose.

This real world context is the appropriate lens through which to view Judge Hinkle's decision in the *Forbes* case, as well as decisions from other jurisdictions which have upheld exculpatory contract provisions and thereby allowed agencies to allocate the risks inherent in international adoption. Put simply, the risks are multiple and known, and absent an ability to require prospective adoptive parents to voluntarily accept the known risks, agencies may be precluded from their critical mission of finding homes for children.

ENDNOTES

* Wall Street Journal, December 7, 1998, "Are Adoption Agencies Liable for Not Telling All?"
2 *Id.*
3 *Id.* at 148.
4 *Id.* at 152-153.
5 *Id.* 148.
6 *Id.* at 156.
7 *Id.* at 158
8 *Id.* at 159
9 *Id.* at 161
10 *Id.*
11 *Forbes v. Alliance* at p 12.
12 *Id.* at pp. 13-14.
13 *Id.* at 14.
14 *Id.* at pp. 14-15.
15 *Id.* at 18-19
16 *Id.*
17 *Id.* at 19.
18 *Id.* at 18.
19 *See Regenburger v. China Adoption Consultants Ltd.*, 138 F.3d 1201 (7th Cir. 1998); *Perez v. World Child, Inc.*, 927 F.Supp. 5th (D.D.C. 1997) *aff'd*, No. 97-7167 (D.C. Cir. Sept. 10, 1998)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 97-04860-B

HOLLE BEVINS FORBES AND ALLEN FORBES

vs.

ALLIANCE FOR CHILDREN & others[1]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT FILIS M. CASEY'S MOTION TO DISMISS

This action arises from the international adoption of plaintiffs' son, Harris Forbes. Defendant Filis M. Casey ("Casey") has moved to dismiss the complaint under Mass. R. Civ. P. 12(b)(6). Since both parties have presented matters outside the pleadings, I treat this motion as one for summary judgment. See Mass. R. Civ. P. 12(b). *For the following reasons, after hearing, Casey's motion* for summary judgment is ALLOWED.

Motion sent 12-17-98 W.T.S. M.C.L.B. J.F.S. R.F.W. S.P.C. P.A. D.N.R. N.M.C. T.W.C. [illegible]

Background

Plaintiffs Holle Bevins Forbes ("Holle") and Allen Forbes ("Allen") are husband and wife. Both plaintiffs are attorneys. Allen is employed by Mintz, Levin, Ferris, Cohn, Glovsky & Popeo, P.C.; Holle is employed by Morrison, Mahoney and Miller.

In 1973, Filis M. Casey founded Alliance for Children, Inc. ("Alliance"), a non-profit corporation operating as an adoption agency. Casey, an attorney, is currently Executive Director of

[1] Filis M. Casey, Kimberly Menard, Judith Freedman, Peter Vrinciani and Anna Maria Vrinciani.

Alliance and a member of the Board.

In autumn 1995, plaintiffs decided they wanted to adopt a child. Holle contacted Alliance, and the plaintiffs soon began meeting with Judith Freedman ("Freedman"), a social worker assigned by Alliance to conduct a home study. During the plaintiffs' meetings with Freedman, they extensively discussed their adoption options and decided to proceed with an international adoption. During their discussions with Freedman, plaintiffs communicated their desire to adopt a healthy child and stated that they were unable to adopt a "special needs" child. On November 27, 1995, the plaintiffs signed a form entitled "Risks Involved in International Adoption" ("Risks Form"). On that same date, the plaintiffs signed a form entitled "Medical Release Form." Casey authored each of these forms.[2] During plaintiffs' dealings with Alliance, Allen had no conversations with Casey concerning Harris. Holle, to the best of her knowledge, has never spoken with Casey.

Alliance assigned plaintiffs a child, Stefan Podak, later named Harris Wayne Forbes ("Harris"), born on November 28, 1994. Harris had lived in a Romanian institution all his life. Dr. Aurelia Stela-Babus, the director of the orphanage in which Harris lived, completed a Fisa de Adoptie ("Fisa") for Harris on December 29, 1995. At that time, according to Romanian law, the Fisa was the only medical information form required by the Romanian Adoption Committee to be filled out and made available to adoption agencies.

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[2] Casey admits in her deposition testimony that she authored the Risks Form. For purposes of this motion, defendant assumes that she authored the Medical Release form as well.

The medical information contained in the Fisa was provided to Alliance in accordance with Romanian law. The Fisa was the only medical information provided to Alliance before Harris' adoption, and consequently, the only medical information provided the plaintiffs before Harris' adoption.

Harris' adoption decree was issued by a Romanian Court on February 16, 1996. This decree, in essence, terminated Harris' biological parents' rights, freeing him for adoption, pending final court approval a short time later. On that same date, Holle signed a document entitled "Placement Agreement." Casey authored this document.[3]

The plaintiffs first met Harris on March 4, 1996 in Romania when Harris was 15 months old. At this meeting Harris was unable to sit up, could not hold his head up and was flaccid. He made no sound, did not cry and made no eye contact. The back of his head was flat and bald. The plaintiffs returned to Massachusetts with Harris and finalized the adoption by order of the Suffolk County Probate Court on January 13, 1997.

Harris will be four years old in November. He has received intensive therapy, including physical therapy, occupational therapy and speech therapy since July 1996. He recently learned to walk. He has not yet spoken, nor can he feed or dress himself. He has been diagnosed with Pervasive Development Disorder.[4] He has also

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[3] Like the Medical Release Form, for purposes of this motion, defendant assumes she authored the Placement Agreement.

[4] Plaintiffs do not define this disorder or any of the subsequently mentioned medical conditions.

been diagnosed with giardia, tuberculosis, lazy eye and a hearing disorder.

Plaintiffs' theories of liability are intentional misrepresentation, negligent misrepresentation and negligence against Casey[5] and the other individual defendants. Plaintiffs also allege intentional misrepresentation, negligent misrepresentation, breach of contract and violations of G.L. c. 93A against Alliance. More specifically, plaintiffs allege that Alliance and the individual defendants intentionally and negligently misrepresented the neurological, developmental and/or medical condition of Harris, as well as the risks of adopting an institutionalized Romanian child. They also allege that Casey was negligent in (1) providing written materials for prospective *adoptive parents; (2) obtaining and providing medical information* to them; and (3) in failing to provide appropriate supervision, control, education and training at Alliance regarding development of adoptive children and disclosure of information to prospective adoptive parents.

Discussion

Summary judgment is warranted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Community Nat'l Bank v. Dawes, 369

[5] In the 13th Cause of Action, Holle alleges negligent misrepresentation against Casey; in the 18th Cause of Action, *Allon makes the same claim. The 23rd and 28th Causes of Action* plead intentional misrepresentation, and the 33rd and 34th Causes of Action plead negligence.

Mass. 550, 553 (1976); Cassesso v. Comm'r of Correction, 390 Mass. 419, 422 (1983); Mass. R. Civ. P. 56(c). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue and entitlement to judgment as a matter of law. Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989). Establishing the absence of a triable issue requires the nonmoving party to respond by alleging specific facts demonstrating the existence of a genuine issue of material fact. Pederson, 404 Mass. at 17. The nonmoving party cannot defeat the motion for summary judgment by resting on its "pleadings, and mere assertions of disputed facts...." LaLonde v. Eissner, 405 Mass. 207, 209 (1989). The moving party is entitled to summary judgment if it demonstrates ...that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991).

I. Misrepresentation Claims

Casey argues that plaintiffs' misrepresentations claims are not pled with particularity and that plaintiffs have no reasonable expectation of proving essential elements of these claims. Plaintiffs contend that their claims have been sufficiently pled and that they have set forth all essential elements of valid misrepresentation claims.

1. Failure to Plead with Particularity

I reject the claim that the fraud count is insufficiently

pled. Although the first amended complaint is no model of pleading, in light of the notice pleading requirement, I rule that it sets forth a misrepresentation claim against Casey. See paragraph 26.

2. Essential Elements of Plaintiffs' Misrepresentation Claims

It is settled law that traditional tort principles apply to the relationship between adoption agencies and potential adoptive parents during the adoption process. See Mohr v. Commonwealth, 421 Mass. 147, 163 (1995). To recover for intentional misrepresentation, plaintiffs must show that the defendant made a false representation of material fact with knowledge of its falsity to induce the plaintiff to act thereon, and that the plaintiffs relied on such representation as true and acted upon it to their detriment. Barrett Assocs., Inc. v. Aronson, 346 Mass. 150, 152 (1963). In order to recover for negligent misrepresentation, plaintiff must show that the defendant supplied false information for the guidance for others, resulting in pecuniary loss to those others, caused by their justifiable reliance upon the information, if defendant fails to exercise reasonable care or competence in obtaining or communicating the information. Restatement (Second) Torts § 552(1) (1977); Fox v. F & J Gattozzi Corp., 41 Mass. App. Ct. 581, 587 (1996).

Defendant argues that since Casey had no communication with either plaintiff, there is no actual representation upon which any misrepresentation claim may be based. Plaintiffs, on the other

hand, contend that since Casey authored the Risks Form, Medical Release Form and Placement Agreement, any statements contained therein are representations which provide sufficient basis for their claims. Plaintiffs are correct on this issue. While Casey did not know plaintiffs when she authored the relevant forms, if the forms contain misrepresentations, lack of direct communication between plaintiffs and Casey does not preclude plaintiffs' claims.

Casey next argues that the statements upon which plaintiffs rely are not statements of fact. Whether a statement is a representation of fact depends upon the nature of the representation, the meaning of its language as applied to the subject-matter and as interpreted by the surrounding circumstances. See Stubbs v. Johnson, 127 Mass. 219, 220 (1879). A representation which is merely a matter of opinion, estimate or judgment does not support a claim of misrepresentation. Powell v. Rasmussen, 355 Mass. 117, 118 (1969). False statements of belief are also insufficient to support a claim of misrepresentation. Harris v. Delco Prods., Inc., 305 Mass. 362, 365 (1940). Likewise, statements of conditions to exist in the future or statements that are promissory in nature are insufficient. Id.

Here, plaintiffs' misrepresentation claims against Casey are based on five written statements authored by Casey for Alliance's use in its dealings with prospective adoptive parents. The first two statements appear in the so-called Risks Form, signed by the plaintiffs on November 27, 1995, at the beginning of their dealings with Alliance and before the plaintiffs were assigned Harris. The

third statement is in the Medical Release Form, signed by the plaintiffs on that same date. The fourth and fifth statements are in the Placement Agreement signed by Holle on February 16, 1996, after plaintiffs were assigned Harris. I will address each statement in turn.

The Risks Form states in relevant part: "It is our intention to inform our families as completely as possible of all aspects of the adoption process." Page 1, para.1. This, the first sentence of the Risks Form, precedes the statement "[w]e are not trying to discourage you from international adoption, however, we want to inform you of the risks. We want you to understand the realities, assess your ability to handle them, and encourage you to ask your social worker for assistance." The form then relates in detail the numerous uncertainties, frustrations, difficulties, and Alliance's lack of control over many aspects of the international adoption process.

The language "inform...as completely as possible" necessarily implies that there are aspects of international adoption about which it is not possible to inform plaintiffs at the outset of the adoption process. Consequently, I find and rule that the nature of this statement, the language used and its context demonstrate that the statement is not a representation of fact, but rather an introductory policy statement.[6] Therefore, this statement is

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[6] Plaintiffs do not allege, nor could they, that this statement should be interpreted as a statement of present intention of future conduct and therefore, a statement of fact. See Feldman v. Whitmark, 254 Mass. 480, 481 (1926); Barrett, 346 Mass. at 152. First, the statement does not guarantee any

insufficient to support a claim of misrepresentation.

Plaintiffs also rely for their misrepresentation claim on another provision in the Risks Form: "Although you can expect a reasonably healthy child, he/she may have temporary, correctable health problems, such as: ... 3. Possible developmental delays due to lack of one on one stimulation." *Risks Form*, p. 2, para.2. In support of their claim that this statement is a statement of fact, they point out that one of Alliance's employees had adopted a Romanian child, who was still experiencing developmental delays in 1995, approximately four years after his adoption. Plaintiffs' contention fails.

Plaintiffs try to re-write this statement into a guarantee by Casey about the nature of developmental delays. In the context of the inherent risks in the international adoption process and all the cautionary language in the *Risks Form*, this interpretation fails. The Risks Form was presented to plaintiffs near the outset of the adoption process. The form includes an extensive list of difficulties and frustrations in the process and specifically states that the difficulties and frustrations are not limited to those enumerated. At the end of the form, plaintiffs acknowledged that they had read the form and that they felt they could handle the listed possible risks "or other eventualities which may occur."

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specific future act by Alliance. Second, plaintiffs do not allege an essential element of this type of representation, nor could they based on the undisputed facts, that Casey, from the outset, had no intention of "informing families as completely as possible." See McEvoy Travel Bureau, Inc. v. Norton Co., 408 Mass. 704, 708-709 (1990).

(Risks Form, p. 3, para.1) They also acknowledged that they were "*fully aware that there [might] be additional risks besides the* risks herein described" (Id. at para.2), and they acknowledged that Alliance and its representatives could not "guarantee the future medical condition of the child" (Id. at para.4).

Plaintiffs also rely on the following provision in the Medical Release Form: "I/[w]e the undersigned hereby acknowledge that [Alliance] will make every effort to offer for adoptive placement a child who is healthy, medically, psysiologically [sic], emotionally, and psychologically." Paragraph 1. This, the first sentence of the Medical Release Form, precedes the statement: "However, not withstanding [sic] the best efforts of this agency and its agents, a child may have conditions which were undiagnosed or undetected." In context, the statement encompasses the inherent uncertainties of the international adoption process and necessarily implies that aspects of a child's health may be unknown, even to Alliance. In signing the form, plaintiffs' acknowledged their awareness of the inherent uncertainties regarding a prospective adoptee's health ("medically, psysiologically [sic], emotionally and psychologically").[7] Consequently, I find and rule that this statement is insufficient to support a claim of misrepresentation because it is not a statement of fact.

Plaintiffs also base their claim upon a representation in the

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[7] This statement, like the first statement in the Risks Form, cannot be interpreted as a statement of present intention to do a future act. The language "every effort" does not specify future conduct.

Placement Agreement: "The undersigned adoptive Parents agree:...2. [t]hat [t]he Alliance has provided them with all information available to it concerning such child sufficient to enable them to make a decision of whether to accept the child for purposes of adoption." Page 1, para.4. While the statement was authored by Casey, this statement in context is merely an acknowledgement by plaintiffs that they had the information they believed they needed to decide whether to accept Harris. Because Casey had no contact with the plaintiffs, she had no actual knowledge of what information the plaintiffs had. Moreover, the decision as to whether the information was sufficient rested with plaintiffs, not Casey. Consequently, I find and rule that this statement does not support plaintiffs' misrepresentation claims.

Finally, plaintiffs base their misrepresentation claim upon another statement in the Placement Agreement: "The Alliance agrees:...3. [t]hat it will provide the undersigned Adoptive *Parents with such additional information relevant to the child's* history and to the child's future growth and development to the extent it becomes available to the Alliance prior to legalization." Page 2, para.3. This statement can only be interpreted as promissory in nature and is thus insufficient to support a claim of misrepresentation. See Harris, 305 Mass. at 365.

Thus, Casey is entitled to summary judgment on plaintiffs' intentional and negligent misrepresentation claims.

II. Negligence Claims

Defendant argues that plaintiffs' negligence claims against Casey are barred because plaintiffs, both experienced attorneys, agreed in writing to hold Alliance and its employees harmless. Plaintiffs claim that the hold harmless provisions in the releases cannot be enforced by the court because Casey did not intend that the releases would relieve the defendants of liability for negligence, because enforcement of the provisions would run afoul of public policy, and because Alliance allegedly breached its contractual obligations to the plaintiffs.[8]

Casey bears the burden of proving that a release legally binds plaintiffs. Kelli v. Forsyth, 301 Mass. 203, 206 (1938). Thereafter, plaintiff has the burden of proving the existence of facts showing that the release should not be enforced. Barletta v. New York, New Haven & Hartford R.R., 297 Mass. 275, 278 (1937). It is settled law that a defendant is entitled to summary judgment where the plaintiff's claims are barred by a valid release. See Cormier, 416 Mass. at 286-287. It is also well settled that an unambiguous agreement must be enforced according to its terms, Schwanbeck v. Federal-Mogul Corp., 412 Mass. 703, 706 (1992), and that construction of such an agreement presents a question of law.

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[8] Plaintiffs, in their response to defendant's reply brief, also assert that the releases were procured by misrepresentation and are therefore unenforceable. While fraud is grounds to invalidate a release, Cormier v. Central Massachusetts Chapter of the National Safety Council, 416 Mass. 286, 288 (1993), plaintiffs fail to set forth specific facts to support such a claim. See Lee v. Allied Sports Assocs., 349 Mass. 544, 551 (1965).

Hillier v. Submarine Signal Co., 325 Mass. 546, 549-550 (1950). Absent fraud or duress the release at issue here is valid. Lee, 349 Mass. at 550-551, although any doubts about the interpretation of the release must be resolved in the plaintiff's favor. Cormier, 416 Mass. at 288.

The Risks Form states in relevant part:

> In consideration of [Alliance] undertaking to assist us in seeking to adopt a child from another country, we agree to indemnify and hold harmless [Alliance], its Directors, Officers, representatives, and employees, from any problems or liability. We understand that [Alliance] nor any of its representatives can guarantee the future medical condition of *this child. Therefore, the Adoptive Parents agree not to hold* [Alliance] or any of its representatives responsible for any medical conditions which might develop or be discovered in the future.
>
> We have read and understand, and acknowledge the risks, nevertheless, it is our desire to go forward with the adoption process.

This was signed by plaintiffs on November 27, 1995, which was also when they signed the Medical Release Form, which states in relevant part:

> We do hereby release, indemnify and hold harmless [Alliance], its directors, officers, representatives, and employees should a child be diagnosed as being HIV, having or suffered from *AIDS or AIDS related complex, from Hepatitis B, or any* presently undiagnosed and untested medical condition or illness regardless of its severity.
>
> We agree to hold [Alliance] harmless for any illness the child may have or acquire and the consequences of such illness or for the child's death resulting from any such illness. Furthermore, we understand that neither [Alliance] nor any representative can guarantee the future medical condition of *this child. Therefore, we agree not to hold [Alliance] or any* of its representatives responsible for any medical conditions presently undiagnosed or untested which might develop or be discovered in the future.

On February 16, 1996, Hollo signed the Placement Agreement

which states in relevant part:

> Upon completion of the above obligations of [Alliance], we agree to indemnify and hold harmless [Alliance] and release its directors, officers, representatives and employees from all liability and damages arising out of, or associated with, the placement of the child in the home of the Adoptive Parents. Furthermore, we understand that neither [Alliance] nor any of its representatives can guarantee the present or future medical condition of the child. Therefore, we agree not to hold [Alliance] or any of its representatives responsible for any medical conditions which might develop, or be discovered in the future.

Thus, early in the adoption process, in clear, unambiguous language, plaintiffs agreed that they read, understood and acknowledged the risks of international adoption and agreed to indemnify and hold harmless Casey as Director of Alliance. In the Risks Form plaintiffs agreed to hold Casey harmless from "any problems or liability" and "any medical conditions which might develop or be discovered in the future." In the Medical Release Form plaintiffs agreed to hold Casey harmless should a child suffer from "any illness the child may have or acquire" and "any presently undiagnosed and untested medical condition or illness regardless of its severity." In the Placement Agreement, when plaintiffs were assigned Harris, plaintiffs agreed not to hold Casey responsible for "any medical conditions which might develop or be discovered in the future." Plaintiffs also agreed to release Casey from "all liability arising out of or associated with" the placement of Harris. (emphasis added)

This release language was neither in small print nor concealed within a lengthy form. As stated previously, plaintiffs are practicing attorneys who therefore know better than most the

significance of the releases they executed. Each release contains comprehensive language regarding claims based upon Harris' medical conditions and/or illnesses. These releases are comprehensive in scope, covering present and future conditions and known and undiscovered conditions. Therefore, I find and rule that all negligence claims based on Harris' medical conditions or illnesses are barred by the releases.

In addition, both the Risks Form and the Placement Agreement contain broad unambiguous, release provisions relieving Casey from liability for negligence claims predicated on anything other than Harris' medical condition. Plaintiffs agreed in the Risks Form to indemnify and hold harmless Casey from "any problems or liability." In the Placement Agreement plaintiffs agreed to indemnify, release and hold harmless Casey from "all liability and damages arising out of, or associated with, the placement of" Harris. Therefore, insofar as plaintiffs' negligence claims are predicated on Casey's provision of adoption services, supervision, training, control and education, these claims are also barred by the release provisions.

Plaintiffs argue that the release provisions are unenforceable because Casey stated in her deposition testimony that she did not intend the release contained in the Risks Form to relieve Alliance from liability for negligence.[9] Plaintiffs principally rely on the following testimony in support of their position.

> Q: Did you in writing this language intend that [Alliance] would not be liable even if its representatives were

[9] Casey's intent as to the Medical Release Form and the Placement Agreement are not part of the record.

negligent in performing adoption services?

Ms. Wilson: Objection. You may answer.

A: That was not my intent.

Q: What did you intend in writing this document to express in the event that one or more of the representatives of [Alliance] were negligent in performing adoption services?

Ms. Wilson: Objection. You may answer.

A: That was not addressed in this document.

Q: In writing this document did you intend that [Alliance] would be responsible for legally responsible for the negligence of any of its employees or other representatives?

Ms. Wilson: Objection. You may answer.

A: In writing this document, it was my intention to inform families of what risks were possible and to have them understand that we could not be responsible for medical conditions in the future. That was my intent.

Q: Did you think about what would occur if [Alliance] or its representatives were negligent in failing, for example, to disclose certain medical information or risk information?

Ms. Wilson: Objection. You may answer.

A: I knew that [the] Alliance disclosed all information that we had in every case, and so that was not the intention in this document to address that.

Q: Did you think that [the] Alliance would be legally responsible in the event that it failed negligently failed to disclose that type of information or risks about which [the] Alliance knew?

Ms. Wilson: Objection. You may answer.

A: I believe that if we did not disclose information that we had that we would have responsibility for that, yes.

(Casey Dep., pp. 66-68)

Defendant is correct that these deposition statements constitute inadmissible parol evidence where, as here, a release is

clear and unambiguous. A release unequivocal in its terms cannot be explained by parol evidence. Tupper v. Hancock, 319 Mass. 105, 108 (1946); White Construction Co., Inc. v. Commonwealth, 11 Mass. App. Ct. 640, 644 (1981). However, plaintiffs contend that mutual mistake, lack of integration and ambiguity render this parol evidence admissible in the present case, citing, among other cases, Polaroid Corp. v. Travelers Indem. Co., 414 Mass. 747, 756 (1993)(parol evidence rule does not bar extrinsic evidence of intent where mutual mistake alleged); Regina Grape Products Co. v. Supreme Wine Co., 357 Mass. 631, 634 (1970)(where only partial integration, parol evidence admissible); and Coleman Bros. Corp. v. Commonwealth, 307 Mass. 205, 209 (1940)(parol evidence admissible where terms of agreement ambiguous).

Plaintiffs claim mutual mistake on the ground that they assumed that the releases at issue here would not absolve Alliance of negligence. Plaintiffs also argue that the written documents are not integrated because the Risks Form refers to oral discussions, and claim that the releases are ambiguous because they do not contain the word "negligence." Even assuming these contentions are meritorious, this would not alter the result reached here. Plaintiffs' arguments ignore that they executed not only the Risks Form, but also two other documents which contain hold harmless provisions.

Plaintiffs also contend that enforcing the release clauses violates public policy. Plaintiffs rely on regulations promulgated by the Office for Children, 102 C.M.R. § 5.00, et seq., Mohr v.

Commonwealth, 421 Mass. 147 (1995) and G.L. c. 119A, § 1. Defendant contends that plaintiffs are seeking to legislate by judicial decree, that enforcing the releases violates no established public policy, and that public policy is well-served by allowing sophisticated individuals like plaintiffs and adoption agencies like Alliance to allocate the inherent risks of international adoption in order to facilitate such adoptions.

"Courts do not go out of their way to discover some illegal element in a contract or to impose hardship upon the parties beyond that which is necessary to uphold the policy of the law." Beacon Hill Civic Assn. v. Ristorante Toscano, Inc., 422 Mass 318, 320-321 (1996) quoting Nunsenbaum v. Chambers & Chambers, Inc., 322 Mass. 419, 422 (1948). "'Public policy' refers to a court's conviction, grounded in legislation and precedent, that denying enforcement of a contractual term is necessary to protect some aspect of public welfare." Beacon Hill Civic Association, 422 Mass. at 321. It is well-settled that the allocation of risk by agreement is not contrary to public policy.[10] Minassian v. Ogden Suffolk Downs, Inc., 400 Mass. 490, 493 (1987).

Plaintiffs attempt to draw support for their public policy argument by directing the court's attention to certain regulations promulgated by the Office for Children. Generally, 102 C.M.R. §

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[10] Exculpatory contract provisions have been upheld in the context of wrongful adoption suits resulting from international adoptions in two cases. See Regensburger v. China Adoption Consultants, Ltd., 138 F.3d 1201 (7th Cir. 1998); Ferenc v. World Child, Inc., 977 F. Supp. 56 (D.D.C. 1997), aff'd, No. 97-7167 (D.C. Cir. Sept. 10, 1998).

5.04(8)[11] prohibits an agency licensed by the Office for Children from knowingly and willfully making false statements to prospective adoptive parents. 102 C.M.R. § 5.10(9)[12] requires disclosure of certain information to prospective adoptive parents to the extent available. There is no evidence before me that Casey breached either of the regulations. Plaintiffs argue that enforcing the release clauses here gives plaintiffs no remedy for a violation of these obligations.[13] I disagree. These regulations fail to directly support plaintiffs' conclusion that public policy precludes allocation of risk by agreement between an adoption agency and prospective adoptive parents in the international adoption context.

Plaintiffs rely on Mohr v. Commonwealth, 421 Mass. 147 (1995), for additional support for their public policy argument. In Mohr, the Supreme Judicial Court ruled that a cause of action could be maintained against an adoption agency based upon negligent material misrepresentations made before adoption concerning the adopted child's history. Id. at 159. Plaintiffs argue that Mohr sets forth a common law policy that lack of remedy against an adoption agency will not be sanctioned. Plaintiffs read Mohr too broadly. Mohr does not address the well-settled principle that parties may

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[11] In 1995-1996, this provision appeared as 102 C.M.R. § 5.07(11).

[12] In 1995-1996, this provision appeared as 102 C.M.R. § 5.06(10).

[13] Defendant does not argue here that the releases bar plaintiffs' misrepresentation claims.

allocate risk and liability by contract, where plaintiffs, it without a remedy, are in that position because of their own knowing and voluntary conduct.

Plaintiffs' reliance on G.L. c. 119A, § 1 is also misplaced. Chapter 119A relates to child support enforcement. Section 1 states in relevant part: "It is the public policy of the commonwealth that dependent children shall be maintained, as completely as possible, from the resources of their parents, thereby relieving or avoiding, at least in part, the burden borne by the citizens of the commonwealth." Neither the statutory provision nor the case law generated by the statutory provision addresses allocation of risk by agreement in the present context.

Finally, plaintiffs argue that the releases are ineffective because, they claim, Alliance materially breached the agreements. In support of their contention, plaintiffs reference portions of the Risks Form, Medical Release Form and the Placement Agreement. The Risks Form and Medical Release Form, however, provide information to the prospective adoptive parents and release Alliance from liability. It is the Placement Agreement which imposes contractual obligations upon Alliance. From the Placement Agreement, plaintiffs assert that Alliance failed to "provide the undersigned Adoptive Parents with such additional information relevant to the child's history and to the child's future growth and development to the extent it becomes available to the Alliance prior to legalization." Placement Agreement, p. 2, para.3. Based on the undisputed facts, plaintiffs have not identified any

information available to Alliance between the time the Placement Agreement was signed on February 16, 1996 and the legalization of Harris' adoption on January 13, 1997 that Casey failed to disclose in breach of the contractual provision.

ORDER

For the foregoing reasons, defendant Filis M. Casey's motion for summary judgment is ALLOWED.

Margaret R. Hinkle
Margaret R. Hinkle
Justice of the Superior Court

DATED: December 16, 1998